but still one that pleases neutrals, may be forgiven if it draws a little of the holy sanction of the law of nations to its aid.

The same thing may explain the language of the early cases that we have spoken of. Until well into the last century "Order in Council" meant an Order by the King; the delegation of legislative power to His Majesty in Council is, in anything like its present prevalence, quite modern.[8] Faced with an order strictly by Prerogative, the older courts, like the Privy Council now, refused to follow it, and relied on the Law of Nations or the Law of Nature as one reason for their holding. It cannot be doubted that a modern court, faced with an Order in Council made under real legislative delegation of authority, would follow out the Order.

PRICE MAINTENANCE AT COMMON LAW AND UNDER PROPOSED LEGISLATION.—A movement has long been on foot to secure to manufacturers of trade-marked articles the statutory right to fix by contract the prices at which their products shall pass through the channels of distribution down to the ultimate consumer.[1] The promoters of this legislation contend, and some cases support their view,[2] that such right exists on common law principles.[3] Whatever restraint is laid on competition among distributors by this policy they maintain is not injurious, but beneficial to the public, and necessary under modern methods of business to protect the quality of, and market for, the manufacturer's trade-marked product.[4] At first glance, the manufacturer's alignment with jobber and retailer to secure this legislation seems anomalous, for what profits distributors receive apparently should not concern him.[5] According to traditional economic theory, the smaller the retail price the larger the volume of sales, with correspondingly increased profits to the manufacturer. But practice finds the manufacturer allied with jobber and retailer for reasons psychological and pecuniary. By nature he is prone to support the existing system of distribution against the innovations of price-cutters, and moreover, he may believe that his valuable trade-mark loses on the cheap bargain counter respectability and prestige. To self-interest, however, he ascribes his position. Trade-marked or "identified" goods, it is asserted, are advertised by nation-wide campaigns conducted by their

[8] See MAITLAND, CONSTITUTIONAL HISTORY OF ENGLAND, 387 *et seq.*

[1] Stephens Bill, 64th Congr., 1st Sess. H. R. 13568.

[2] Grogan *v.* Chaffee, 156 Cal. 611, 105 Pac. 745; Park *v.* National Wholesale Druggists' Ass'n, 175 N. Y. 1, 67 N. E. 136; Fisher Flouring Mills Co. *v.* Swanson, 76 Wash. 649, 137 Pac. 144; Walsh *v.* Dwight, 40 App. Div. (N. Y.) 513; Commonwealth *v.* Grinstead, 111 Ky. 203, 63 S. W. 427; National Phonograph Co., Ltd. *v.* Edison-Bell Consolidated Phonograph Co., Ltd., [1908] 1 Ch. 335. See Report of Committee on Maintenance of Prices, 4th Annual Meeting, Chamber of Commerce of the United States. *Contra*, W. J. Shroder, "Price Restriction on the Re-Sale of Chattels," 25 HARV. L. REV. 59.

[3] See R. G. Brown, "The Right to Refuse to Sell," 25 YALE L. J., 194.

[4] See G. H. Montague, "Should the Manufacturer have the Right to Fix Selling Prices?" 63 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 55. W. H. Ingersoll, "The Answer to Macy's," PRINTER'S INK, May 6, 1915. E. S. Rogers, "Predatory Price Cutting as Unfair Trade," 27 HARV. L. REV. 139. Hearings on H. R. 13568, May 30 and June 1, 1916.

[5] F. W. Taussig, "Price-Maintenance," AM. EC. REV., Mar., 1916, p. 170.

makers, and become standard articles universally known by name and price. For a department store to cut to eighty-nine cents the watch that made the dollar famous means that all retailers have to follow suit, whereupon they are killed off one by one or, at least, bring price-reducing pressure on the manufacturer through the jobber, and moreover push other articles in place of the less profitable "leaders." Deterioration in the quality of trade-marked goods is said to result, and with no compensating gain, because the aim of the piratical price-cutter is asserted to be merely to lure the gullible public into a bad bargain on unknown goods.[6]

The opponents of price maintenance, who find their leaders among the large department stores and the chain retail store concerns, contend that an artificial uniformity of prices prevents the operation of forces, such as differences in location, business acumen and adventurousness, and suppresses economic advantages flowing from large scale operations. This agitation they dub an attempt by a vested system to defend itself against the experiments being made to develop a goods-distributing mechanism more in conformity with social needs.[7]

What is the result of judicial attempts to adjudicate these conflicting interests? Diametrically opposed decisions. State courts have reasoned that the common law permits price agreements framed through necessity to enable manufacturers to maintain the standard of their goods and to protect consumers from the deception of unscrupulous traders, even though the cost may be a limitation of competition among distributors.[8] The United States Supreme Court, in the case of *Dr. Miles Medical Co.* v. *Park & Sons Co.*,[9] decided that a system of price-maintenance contracts, to control the price of a monopolized commodity, was illegal, at common law and under the Sherman Act. There are experts, both in law and economics, who have given intensive study to the subject, and they too take opposing sides.[10] The conclusion is inevitable that a solution one way or the other of this problem by sitting *in banc* is impossible; eclectic experimentation seems to be the way to reach a just social arrangement that will combine the advantages and eliminate the evils of both systems. This means that the problem cannot be solved on the basis of known facts, by an absolute declaration of rights one way or the other, but by an adjusting and harmonizing of manufacturing and distributing elements so that they may work, not as conflicting forces, but as parts of a single social organism.

The chief merit in the Stevens Price Maintenance Bill is its embodiment of this attitude. It aims to secure the right to maintain prices, but it does not raise adequate safeguards against the dangers of the system. A manufacturer may obtain the right by filing with the Federal Trade

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[6] See Fisher Flouring Mills Co. *v.* Swanson, 76 Wash. 649, 669; 137 Pac. 144, 151. See also, Ingersoll, Montague, and Rogers, *supra*, note 4.

[7] See Minority Report of the Committee on Maintenance of Prices, *supra*, note 2.

[8] See note 2, *supra*.

[9] 220 U. S. 373. Attempts have been made to distinguish this case on the ground that the commodity involved was a monopoly and that where that element was lacking price maintenance was legal. See R. G. Brown, note 3, *supra*. A more logical deduction, however, would be that if price maintenance were illegal in the case of a legal monopoly it would be so *a fortiori* in case of an ordinary article.

[10] See Taussig, note 2, *supra*. Hearings on H. R. 13568, May 30 and June 1, 1916.

Commission a list of prices and complying with these conditions: first, the commodity must be available to all on equal terms; second, it must be in competition with other similar articles; and third, there must have been no collusive price-setting with competitors. Of course the Sherman Act provides the last two conditions. Other details provide for practical flexibility.[11] Stiff, unreasonable prices, however, the danger of this price-maintenance system and the bugbear of its opponents, are not guarded against.[12] The assumption that publicity will bring fairness seems unwarrantable. Instead of being a bureau for the burial of price lists, the Commission should have the power to refuse registration to goods unduly dear. Protection to the public is the price manufacturers and distributors should pay for protection to themselves. Under the proposed bill equity would probably refuse specific performance of a filed price-maintenance contract should the price-cutter prove that his vendor was mulcting the public, but the more desirable arbiter of reasonableness, both for the sake of uniformity and for the sake of expertness, is the administrative commission.[13] Under this system a palpably unfair refusal on the score of unreasonable price, monopoly, or collusive price-setting by the Commission would be subject to correction by the courts.[14] Apart from this check the findings of the Commission should be conclusive in any suit to enforce rights under the bill.

Securing the right to maintain prices through contract is by no means the only object sought by the bill. In an obscure way it seeks to apply the doctrine of equitable servitudes to branded articles, that is, to compel all to sell the goods at the set price though they may not have purchased them under a price-fixing contract but had notice of the price restriction — a necessary concomitant of the contractual right if the latter is to be effectual.[15] The common law has always opposed restrictions on chattels, and it is not clear that equity would enforce such on the view that the statute under discussion, by legalizing contractual restrictions on price, has overthrown the common law antipathy.[16] Therefore the bill provides

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[11] The bill provides for (1) seasonal disposal sales; (2) procedure in case of winding up business of manufacturer or dealer; (3) disposal of deteriorated goods. In all cases the manufacturer is given the opportunity to repurchase before the set price may be departed from.

[12] See Taussig, *supra*.

[13] Texas & Pac. Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426.

[14] For the assumption of rightness of legislative conduct, where the court is uninformed, see Hadacheck *v.* Sebastian, 239 U. S. 394, 413.

[15] The bill is not explicit on this point, which is allotted space in inverse proportion to its importance. Really the constitutionality of the bill turns on this element. However, the only intimation of its inclusion comes in the section relating to the retail price of the articles registered. At the set price must the articles be sold "from whatever source acquired." This strikes one as an attempt to make the weakest link look like no link.

[16] An analogy on this point is sometimes drawn from the right to impose restrictions on articles manufactured under a patent, the argument being that society's interest in the progress of invention overrides the common law antipathy to restraints on personalty. This policy overruled, the theory of equitable servitudes is held to apply to chattels. The patent cases, however, rest upon quite a different theory. A patentee has the exclusive rights to make, use, and sell the embodiments of his invention. Since these rights are separable and may be granted independently of one another, Dorsey Revolving Harvester Co. *v.* Bradley Mfg. Co., 12 Blatchf. (U. S.) 202, 204, he may sell a patented article and grant a limited right of user — for example, a license to use

that the listed articles must be sold at the fixed price, whether acquired under a contract or otherwise.

The result is that Congress by passing the bill would be providing for the regulation of the price of branded goods through all turnovers down to ultimate consumption, though all but the first sale of the goods may have taken place within a state among local dealers. This entails the proposition — once interstate goods always interstate, until withdrawn from the arteries of trade. What is the law? A sale of an article from without a state by an importer or his agent falls within the bounds of interstate commerce;[17] a sale by his vendee pursuing the latter's own business does not.[18] Apparently, therefore, the right contended for by the advocates of set prices is not the subject of federal legislation. But a more fundamental view unfolds itself. The purpose of the making of goods is their consumption, and the manufacturer must then get his goods to consumers. A direct transportation and sale over a state line are undeniably interstate commerce. It would seem that the interpolation of the aid of distributors should not affect the essential unity of the operation. For the more nearly the jobber and retailer in fact approximate agents of the manufacturer, *e. g.*, the manufacturer's recent efforts to aid and instruct the retailer with special advertising devices and special publicity experts, the more truly does the manufacturer sell directly to the consumer.[19]

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with supplies bought from him. Any violation is an infringement of the exclusive right of user retained by the patentee, is a tort, and may be enjoined. Henry *v.* Dick Co., 224 U. S. 1. On the theory of the cases this ruling does not allow the imposition of equitable servitudes on patented articles, for the patentee retains no property interest, but its use beyond certain limits is forbidden as an encroachment upon an exclusive franchise. See 25 HARV. L. REV. 641; 10 HARV. L. REV. 1. Furthermore, it has been held that a patentee cannot sell and yet retain so much of his exclusive selling privilege as to render a resale at other than his set price an infringement, on the ground that the first sale exhausts the exclusive right to sell under the statute. Bauer *v.* O'Donnell, 229 U. S. 1. The distinction between the interpretation of the words "use" and "sell" in the patent statute is unsound in principle and lends support to those who view these cases as an unconscious application of the doctrine of equitable servitudes to chattels. See 27 HARV. L. REV. 73. This doctrine, it is said, applies only to using, and selling is not using. Equitable servitudes as applied to realty have never comprised restrictions on resale price because vendors of realty are not interested in its resale price as in the case of standard articles of commerce; therefore, because certain restrictions allowed on the latter under the interpretation of a statute happen to be confined to the same type as those applied to realty, it cannot be concluded that they are of the nature of equitable servitudes. The patent cases, consequently, are not authority for the proposition that once the right to contract concerning resale prices is recognized it is so inconsistent with the continuance of the common law policy disallowing restraints on articles of commerce that the doctrine of equitable servitudes may be applied. It should be noted that where the right to contract on resale prices has received judicial sanction, it is held that purchasers with notice cannot be bound by any restrictions. Garst *v.* Hall, 179 Mass. 589, 61 N. E. 219; Bauer & Cie *v.* O'Donnell, 229 U. S. 1; Bobbs-Merrill *v.* Straus, 210 U. S. 339; Taddy & Co. *v.* Sterious, [1904] 1 Ch. 354. See Fisher Flouring Mills Co. *v.* Swanson, 76 Wash. 649, 137 Pac. 144. *Contra*, N. Y. Bank Note Co. *v.* Hamilton Bank Note Co., 28 N. Y. App. Div. 411; Murphy *v.* Christian Press, etc. Co., 38 *ibid.*, 426.

[17] Rearick *v.* Comm. of Pennsylvania, 203 U. S. 507.

[18] Banker Bros. Co. *v.* Comm. of Pennsylvania, 222 U. S. 210; Brown *v.* Maryland, 12 Wheat. 419. See State *v.* Flanelly, 96 Kan. 372, 382, 152 Pac. 22, 26.

[19] G. H. Montague, "Should the Manufacturer have the Right to Fix Selling Prices?" 63 ANNALS OF AM. ACAD. POL. & SOC. SCI. 55.